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September 15, 2005
VIA HAND DELIVERY

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2005 SEP 15 PM 3:18
PUBLIC SERVICE
COMMISSION

Charles L.A. Terreni
Chief Clerk/Administrator
The Public Service Commission of South Carolina
Synergy Business Park
101 Executive Center Drive
Post Office Drawer 11649
Columbia, SC 29211

Re: Docket No: 2005-110-W/S-Order No. 2005-210 *Petition of the Office of
Regulatory Staff to Request Forfeiture of the Piney Grove Utilities,
Inc. Bond and to Request Authority to Petition the Circuit Court for
Appointment of a Receiver*
CT&R No: 1529.001\Piney Grove - ORS

Dear Mr. Terreni:

In accordance with the direction of the Commission at the close of the hearing in the above matter, enclosed please find a proposed Order for the Commission's consideration. I do not believe this proposed Order should be filed. I would respectfully suggest that the enclosure be routed to the appropriate offices.

The enclosure is respectfully submitted on behalf of both Piney Grove Utilities, Inc., and the interveners - D. Reece Williams, IV, and Elizabeth P. Williams.

CALLISON TIGHE & ROBINSON, LLC

Charles L.A. Terreni
Re: Piney Grove Utilities, Inc.
September 15, 2005
Page 2

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC



Louis H. Lang

LHL/cs

Enclosures

cc: Hugh Willcox Buyck, Esq. (w/ encl.)
Benjamin P. Mustian, Esq. (w/ encl.)
Julie F. McIntyre, Esq. (w/ encl.)
Mr. D. Reece Williams, IV (w/ encl.)

1529.001\Piney Grove - ORS\Clerk PSC.006

BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF SOUTH CAROLINA

DOCKET NUMBER 2005-110-W/S

In Re: Petition of the Office of Regulatory Staff to)
Request Forfeiture of the Piney Grove)
Utilities, Inc bond and to Request Authority)
To Petition the Circuit Court for)
Appointment of a Receiver)

The Department of Health and Enviorn-)
mental Control, D. Reece Williams, IV,)
and Elizabeth Williams,)
Intervenors.)

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SC PUBLIC SERVICE
COMMISSION

This matter comes before the Public Service Commission of South Carolina (Commission) on the Petition of the Office of Regulatory Staff (ORS) concerning certain wastewater and water systems owned and operated by Piney Grove Utilities, Inc. (Piney Grove).

A hearing on the merits was held before the Commission on August 9th and August 11, 2005, with testimony and evidence presented by all parties.

THE PETITION AND PARTIES

On April 22, 2005, the ORS filed its Petition seeking the following substantive relief:

1. That the Commission issue an Order requiring Piney Grove to show why it should not be required to take immediate steps to provide adequate and proper service to its customers;
2. Find that Piney Grove has failed to provide adequate and proper service and that this failure has continued for an unreasonable length of time;
3. Pursuant to S.C. Code Ann. Section 58-5-710, impose and assess appropriate penalties against Piney Grove;
4. Declare the a certain bond on file with the Commission for Piney Grove be forfeited; and

5. Grant ORS the authority to petition the Circuit Court for appointment of receiver under S.C. Code Ann. § 58-5-730.

On May 3, 2005, counsel for Piney Grove Utilities filed a motion for a continuance and motion to sever the issues concerning the bond and its sureties from the issue of the appointment of a receiver and fines and penalties. This motion was denied by separate order of the Commission. Thereafter, Piney Grove filed an Answer on May 23, 2005, and a Supplemental Answer on July 29, 2005. Piney Grove, in its Answer and Supplemental Answer, generally denied the allegations in the ORS Petition and in its Supplemental Answer asserted that the issues regarding the appointment of a receiver had been rendered moot by way of an order entered in the Court of Common Pleas for Lexington County on May 24, 2005, in a case bearing Civil Action Number 2005-CP-32-1319, in which Piney Grove consented to the appointment of a receiver (though none has been appointed thus far) for its Lloydwood wastewater treatment facility and an order entered in the Court of Common Pleas for Richland County on July 29, 2005, in a case bearing Civil Action Number 2005-CP-40-3716, in which Piney Grove agreed to the appointment of Richland County as a receiver for its Franklin Park wastewater treatment facility and its Franklin Park and Albene Park water systems.

The Department of Health and Environmental Control (DHEC) filed a Motion to Intervene on May 13, 2005, that motion being granted. In DHEC's response to the ORS Petition, DHEC joined in the ORS request for relief.

On August 8, 2005, D. Reece Williams, IV, and Elizabeth P. Williams (collectively Williams) filed a Motion to Intervene. The Commission granted the Williams' motion and allowed them to appear at the hearing on this matter through their individual counsel. The Williams also moved for a continuance asserting that they had insufficient time in which to

prepare an adequate defense. The Commission held its ruling on this motion in abeyance. For the reasons set forth below, the Williams motion for a continuance is denied as moot.

ORS REQUEST FOR AUTHORITY TO PETITION THE CIRCUIT COURT FOR THE APPOINTMENT OF A RECEIVER

ORS seeks the authority of the Commission to petition a Circuit Court for the appointment of a receiver. In his closing argument, counsel for Piney Grove did not object to such authority being granted and in fact invited the Commission to give ORS this authority, although he maintained that the issue was moot given the prior Orders already entered in the Courts of Common Pleas for Lexington and Richland County which affect all the systems owned and operated by Piney Grove.

While the Commission has grave doubts as to the continued necessity of granting this authority to ORS given the prior Circuit Court orders, in light of the consent of Piney Grove, Commission hereby grants ORS the authority under S.C. Code Ann. § 58-5-730 (Law. Co-op. 1977), to petition the Court of Commons Pleas for Richland and/or Lexington Counties to appoint a receiver or receivers to assume possession of the facilities and systems owned and operated by Piney Grove upon such terms and conditions as that Court or those Courts may prescribe. However, given the already existing Circuit Court orders, the Commission directs the ORS not exercise this authority unless and until one or both of the orders referenced above is dissolved, vacated or otherwise becomes inoperative.

FINES AND PENALTIES

ORS requests that the Commission impose penalties on Piney Grove pursuant to S.C. Code Ann. § 58-5-710 (Law. Co-op. Supp. 2004). This section provides that upon hearing, if the Commission determines that a utility has not provided adequate and proper service, the Commission “shall issue an order requiring the utility to take steps as are necessary to the

provision of the service within a reasonable time as prescribed by the [C]ommission.” This section goes on to provide that upon the failure of the utility to provide such service within a reasonable time as prescribed by the Commission without just cause or excuse, then the Commission shall impose a penalty or fine against the utility in an amount not less than one hundred dollars per day but not more than one thousand dollars per day. While there was evidence presented that in some respects Piney Grove has failed to provide adequate services to its customers, given the clear and unambiguous language of § 58-5-710, the Commission must first make such a finding and order that the deficiencies be remedied. If and only if the utility fails thereafter to provide adequate service within a reasonable time without just cause or excuse may the Commission then impose penalties and/or fines. Accordingly, the ORS request for the immediate imposition of fines and/or penalties must be denied.

PINEY GROVE’S FAILURE TO PROVIDE ADEQUATE SERVICE

ORS requests that the Commission order Piney Grove to show cause why it should not be required to take immediate steps to provide adequate and proper service to its customers. The Commission is of the view that no such order is necessary, Piney Grove has always been required to provide such service. The real issue is whether Piney Grove has failed to provide such service and whether that failure has continued for an unreasonable length of time. If so, the Commission must order Piney Grove to remedy the defects found within a reasonable period of time or suffer the imposition of fines and penalties.

While there is clearly evidence that in many respects Piney Grove has failed to provide adequate services to its customers, it appears that Piney Grove has taken significant steps to divest itself of its wastewater and water systems, so as allow a municipality or other entity to provide service. Piney Grove owns and operates two water systems in Richland County -

Franklin Park and Albene Park, and two wastewater systems - Franklin Park in Richland County and Lloydwood in Lexington County. The Franklin Park wastewater system and the Franklin and Albene Park water systems are presently being run by Richland County pursuant to the Richland County Circuit Court order referred to above. It would be futile for the Commission to order Piney Grove to remedy any defects in service in those systems. Piney Grove no longer exercises any control over these systems and it appears highly unlikely that it ever will again.

A somewhat different situation is present in regard to the Lloydwood system. The Lloydwood wastewater facility, that is the lagoon system in place for treating wastewater from the subdivision, is being run by a licensed operator who is being paid by DHEC, under the Lexington County Circuit Court Order referred to above. The collection system, that is, the pipes running from the houses in the subdivision into the lagoon, is still nominally the responsibility of Piney Grove. However, it does not appear that Piney Grove has the immediate financial ability to remedy any significant defects in its service in regard to the collection system given the circumstances outlined above.¹ The Commission does not wish to enter an order which would be futile, i.e., one which requires Piney Grove to do something it can not do. Accordingly, the Commission declines at this time to enter such an Order as requested by ORS.

THE BOND

ORS alleges that on or about May 17, 2001, Piedmont Water Company, Inc. (Piedmont) submitted a performance bond (Piedmont bond) in accordance with the provisions of § 58-5-720 for the benefit of Piney Grove. Piedmont, its successors and assigns, is the principal of the Piedmont bond, the Williams are the sureties of the Piedmont bond and the Commission is the bond's obligee. The bond provides that the Commission, upon notice and hearing, shall have the

¹ There was some evidence and testimony to the effect that a large percentage of Piney Grove customers are in arrears in regard to their water and/or sewer bills.

right to declare all or part of the bond forfeit on a determination that the principal has “willfully” and without just cause or excuse, failed to provide adequate and sufficient service to its customers.

The Williams, in their answer, assert that the Piedmont bond simply and by its express terms applies only to Piedmont and not to Piney Grove. Regrettably, given the facts of this case, the Commission must agree.

In a prior order of this Commission in Docket Number 2000-588-W (Order No. 2001-761, entered August 20, 2001, subsequent to the Piedmont bond being executed by the sureties) (Consolidation Order) the Commission approved the consolidation of three utilities - Eagle Point Water Company, Inc., Tickton Hall Water Company and Piney Grove - with Piedmont. However, the Commission’s approval of this consolidation was conditional. The Consolidation Order provided that the utilities to be consolidated with Piedmont must meet certain criteria or accomplish certain goals before any consolidation could be accomplished. These criteria or goals included Piedmont’s filing with the Commission annual reports for Eagle Point and Piney Grove within 15 days of the Consolidation Order, Piedmont filing a petition to establish rates and charges for the Tickton Hall water system, the Consolidation Order required the sewer bond on file with the Commission for Piedmont to be increased to \$125,000, and all the water and sewer systems to be consolidated with Piedmont were required to become compliant with all applicable and pertinent DHEC regulations. It appears from the evidence that with the exception of the \$25,000.00, increase in the Piedmont (sewer) bond, none of the prerequisites to consolidation were accomplished. Further, no evidence was presented to the effect that even though none of the prerequisites to consolidation were met, there ever was a formal consolidation of the corporations in question.

The testimony and evidence in this case concerned exclusively the operation and maintenance of the water and sewer systems owned and operated by Piney Grove. Piney Grove is simply not a party - either principal or surety - to the Piedmont bond. Nor is it a successor or assign of Piedmont. Further, given the undisputed testimony that most if not all of the prerequisites to the consolidation of Piney Grove with Piedmont were never accomplished and the lack of evidence that despite this failure Piney Grove was actually consolidated with Piedmont, the actions or inactions of Piney Grove, no matter how egregious, simply cannot form a basis for the forfeiture of the Piedmont bond.

“A surety's obligation is contractual and cannot extend beyond the terms of the bond and the intent of the parties thereto.” *Colonial Construction Company*, 274 S.C. 581, 584, 266 S.E.2d 76, 80 (1980), citing *McKenzie v. City of Florence*, 234 S.C. 428, 108 S.E.2d 825 (1959); *National Loan & Exchange Bank v. Gustafson*, 157 S.C. 221, 154 S.E. 167 (1930).

Given the forgoing, the ORS request for forfeiture of the Piedmont bond must be denied.

In addition, the bond provides that it may be forfeited on a finding that Piney Grove “wilfully” and “without just cause” failed to provide adequate service to its customers. Although there was ample evidence to the effect that Piney Grove failed to provide adequate services, it does not appear that the evidence supports a finding that this failure was wilful. Accordingly, even if the Piedmont bond could answer for the conduct of Piney Grove, that conduct is insufficient, given the terms of the bond, to subject it to forfeiture.

IT IS THEREFORE ORDERED

1. The ORS request that the Piedmont bond be forfeited is denied.
2. The ORS is hereby granted the authority to Petition the Court or Courts of Commons Pleas in the appropriate venues in accordance with the terms and conditions set forth above, for the appointment of a Receiver or Receivers for the wastewater facilities and water systems owned and operated by Piney Grove.
3. The ORS request for the imposition of fines and penalties is hereby denied.
4. The Commission, at this time, declines to enter an Order requiring Piney Grove to remedy the numerous defects in its service, but the refusal of the Commission to do so now does not preclude ORS from requesting such relief in the future should it become necessary.
5. This Order remain in force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice Chairman

(SEAL)